No. 17-1272

In the Supreme Court of the United States

HENRY SCHEIN, INC., ET AL., PETITIONERS

v.

ARCHER AND WHITE SALES, INC.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Two well-established principles of the Court's Arbitration Act jurisprudence resolve this case in petitioners' favor. First, courts are required to enforce arbitration agreements according to their terms—including provisions delegating gateway issues of arbitrability to the arbitrator. Second, where an issue is properly submitted to the arbitrator, a court has no reserved power to decide the issue for itself. The court of appeals erred when it ignored those principles, holding instead that a court could decide a gateway issue of arbitrability for itself, despite a delegation to the arbitrator, if it deemed the claim of arbitrability "wholly groundless."

Respondent does remarkably little to dispute those principles. Instead, respondent offers the same strained

arguments about the text of the Arbitration Act that petitioners have already addressed in their opening brief. Respondent is unable to articulate a colorable statutory basis for the "wholly groundless" exception, confirming that respondent's true complaint lies with Congress.

Confronted with the obvious difficulties in its textual arguments, respondent quickly resorts to policy considerations. Indeed, large swaths of respondent's brief read like a white paper advocating a new and improved arbitration regime. But even assuming respondent's preferred position would make for better policy, that is irrelevant here. This case involves a statute, one the Court has construed many times to require the rigorous enforcement of arbitration agreements according to their terms. The Court "cannot rely on * * * judicial policy concern[s]" to refuse to honor the parties' agreement to delegate arbitrability to the arbitrator. *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 270 (2009).

In any event, respondent's policy arguments lack merit. As this Court has repeatedly recognized, Congress, through the Arbitration Act, expressed a clear federal policy in favor of arbitration. But the "wholly groundless" exception acts as a roadblock to the efficient, inexpensive dispute resolution Congress intended to promote. Nor can respondent's position be justified by resort to the Arbitration Act's history.

In short, the "wholly groundless" exception fails to honor the bedrock requirement that arbitration agreements be enforced according to their terms. The court of appeals' adoption of that exception was erroneous, and its judgment should be vacated.

A. The Arbitration Act Does Not Permit A Court To Decide For Itself The Issue Of Arbitrability If The Parties Have Delegated That Issue To The Arbitrator

As petitioners have explained, this Court has long recognized that parties may agree to arbitrate "gateway" issues of arbitrability in addition to the merits of their underlying dispute. See *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U.S. 63, 67 (2010); *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 944 (1995). "An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement," and the Arbitration Act "operates on this additional arbitration agreement just as it does on any other." *Rent-A-Center*, 561 U.S. at 70. In addition, when an issue is properly submitted to an arbitrator, a court may not arrogate unto itself the power to decide that issue. See *AT&T Technologies, Inc.* v. *Communications Workers*, 475 U.S. 643, 649-650 (1986).

This Court's precedents thus dictate an inexorable conclusion: when parties clearly and unmistakably agree to delegate the authority to decide arbitrability to the arbitrator, a court may not decide arbitrability for itself. Given the clarity of those precedents, it is unsurprising that the courts of appeals to have most thoroughly analyzed the question presented have concluded that there is no valid basis for the "wholly groundless" exception. See *Jones* v. *Waffle House, Inc.*, 866 F.3d 1257, 1269-1270 (11th Cir. 2017); *Belnap* v. *Iasis Healthcare*, 844 F.3d 1272, 1286-1287 (10th Cir. 2017); see also *Douglas* v. *Regions Bank*, 757 F.3d 460, 468 (5th Cir. 2014) (Dennis, J., dissenting).

Respondent wisely does not dispute the principles established by this Court's precedents. Respondent accepts that an agreement to delegate the authority to decide arbitrability to an arbitrator is enforceable, provided the delegation is made with the requisite clarity. See Br. 6-7.

Respondent further admits (if begrudgingly) that an "antecedent agreement" to arbitrate gateway issues of arbitrability can be conceived as a "separate agreement" from the agreement to arbitrate the merits of the underlying dispute. Br. 18. And respondent agrees that, where claims are subject to arbitration, "courts are required to compel arbitration 'whether the claims of the party seeking arbitration are "arguable" or not, indeed even if it appears to the court to be frivolous.'" Br. 17 (quoting *AT&T Technologies*, 475 U.S. at 649-650). As a result, this Court's precedents preclude a court from refusing to enforce an agreement delegating the authority to decide arbitrability to the arbitrator simply because the court believes the claim of arbitrability is "wholly groundless."

In the face of those points, all respondent can say is that the foregoing conclusion is "specious" because an antecedent agreement to arbitrate arbitrability "does not exist in a vacuum." Br. 18. "If there is no plausible argument that the case actually belongs in arbitration," respondent continues, "the delegation issue becomes academic." *Ibid.* In so arguing, however, respondent is asking this Court effectively to ignore its reasoning in *Rent-A-Center* that "[a]n agreement to arbitrate a gateway issue is simply an additional, antecedent agreement" and that the Arbitration Act "operates on this additional arbitration agreement just as it does on any other." 561 U.S. at 70. Notably, respondent does not seek to revisit the reasoning of *Rent-A-Center*, much less offer any basis for the Court to do so.

Respondent further contends (Br. 18) that a party cannot invoke an antecedent agreement to arbitrate arbitrability while conceding that the underlying claims are not arbitrable. That is true, but it adds nothing: a delegation agreement comes into play only when one of the parties disputes the arbitrability of the underlying claims. Put

another way, if the party invoking the delegation agreement concedes that the underlying claims are not arbitrable, there is no arbitrability dispute for the arbitrator to resolve. But when such a dispute arises, *someone* will need to resolve the issue of arbitrability. This Court's decisions interpreting the Arbitration Act do not permit a court to ignore the parties' agreement to delegate the authority to decide the issue to an arbitrator, and instead decide that issue for itself.

B. There Is No Valid Basis For A 'Wholly Groundless' Exception To The Enforcement Of An Agreement Delegating The Authority To Decide Arbitrability To An Arbitrator

1. The 'Wholly Groundless' Exception Has No Basis In The Text Of The Arbitration Act

In attempting to root the "wholly groundless" exception in the text of the Arbitration Act, respondent puts all of its eggs in one basket. According to respondent, a court "cannot be 'satisfied' of a 'failure to comply'" with an arbitration agreement, authorizing the issuance of an order compelling arbitration under Section 4, when "a party's arbitration demand is frivolous." Br. 17-18 (quoting 9 U.S.C. 4). Petitioners addressed that very argument in detail in their opening brief. See Pet. Br. 24-27. Respondent mostly rehashes points that petitioners have already rebutted, and its few additional points are unconvincing.

a. As petitioners demonstrated in their opening brief, the plain text of Section 4 belies respondent's interpretation. Section 4 requires a court to compel arbitration if it is "satisfied that the making of the agreement for ar-

bitration or the failure to comply therewith is not in issue." 9 U.S.C. 4.[1] As this Court has explained, a court "may consider only issues relating to the *making* and *performance* of the agreement to arbitrate" in determining whether to compel arbitration under Section 4. *Prima Paint Corp.* v. *Flood & Conklin Manufacturing Co.*, 388 U.S. 395, 404 (1967) (emphasis added).

The "wholly groundless" exception plainly has nothing to do with the "making" or "performance" of the relevant agreement here—the only things of which a court must be "satisfied" before compelling arbitration under Section 4. As discussed in petitioners' opening brief, the "making" of the agreement concerns contract formation: did the parties enter a valid and binding agreement? And the "performance" of the agreement concerns the nonmoving party's compliance with the agreement: did the party "fail[] to comply" with the agreement by resisting arbitration, so as to require an order compelling arbitration from the court? See Pet. Br. 25. The "wholly groundless" exception relates not to the "making" or the "performance" of the agreement to delegate arbitrability to the arbitrator, but rather to the *merits* of the issue of arbitrability.

Respondent argues that Section 4's focus on the "making" and "performance" of the agreement "proves [its] point." Br. 19. According to respondent, the parties

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[1] At numerous points, respondent suggests that "[t]he failure to comply is the failure to arbitrate under the part[ies'] agreement." Br. 16; see, *e.g.*, Br. 17 (stating that "petitioners cannot explain how a party 'fail[ed] to comply' simply because it filed a claim in court *that belongs in court*"); Br. 20 (stating that "[a] party does not fail to 'perform' by filing a lawsuit that is in fact *not* subject to arbitration"). But that proves far too much: if a court were required to "satisfy" itself that the parties were required to arbitrate the underlying claims before granting a motion to compel arbitration, a delegation of arbitrability would have no effect whatsoever.

would not have "made an agreement to subject themselves" to "wholly groundless" demands for arbitration, and "[a] party does not fail to 'perform'" under an arbitration agreement by filing a lawsuit if the argument in favor of arbitrability is "wholly groundless." *Ibid.*

That argument is too clever by half. The question whether the parties *made* an agreement delegating arbitrability to an arbitrator—in other words, whether a valid and binding delegation agreement exists—is independent from the question whether the underlying dispute is arbitrable. And of course a party fails to *perform* under an agreement delegating arbitrability to an arbitrator by challenging arbitrability in court. Respondent can argue to the contrary only by once again ignoring the principle that "[a]n agreement to arbitrate a gateway issue is simply an additional, antecedent agreement" that the Arbitration Act "operates on * * * just as it does on any other." *Rent-A-Center*, 561 U.S. at 70.

b. At the certiorari stage, respondent suggested that Section 4 offered an alternative textual basis for the "wholly groundless" exception: when a party "files a claim in court that belongs in court," the opposing party cannot be "aggrieved" for purposes of Section 4, because "there is no cognizable prejudice" from bypassing arbitration. Br. in Opp. 25 (emphasis omitted). But respondent now retreats from that argument, conceding that the term "aggrieved" cannot "do the work by itself." Br. 17 n.11.

Respondent instead contends only that the term "aggrieved" "reinforces" its interpretation of Section 4. See Br. 17 n.11. It does not even do that. In the Arbitration Act, Congress protected a party's right to proceed in arbitration according to the terms of a valid arbitration agreement. A party is thus "aggrieved" for purposes of Section 4 as soon as a counterparty refuses to arbitrate

under the terms of the parties' valid arbitration agreement. See Pet. Br. 26-27 (citing cases). When a party fails to comply with an antecedent agreement to arbitrate arbitrability, it leaves the other party "aggrieved" and permits it to seek an order compelling arbitration under Section 4.

c. Respondent also suggests (Br. 20-22) that Section 10(a)(4) of the Arbitration Act supports its reading of Section 4. Respondent's argument proceeds as follows. Under Section 10(a)(4), a court can vacate an arbitration award if an arbitrator "exceeded [his] powers." "If an arbitration demand is 'wholly groundless,'" respondent contends, "then the arbitrator[] necessarily will have exceeded [his] powers by proceeding with the arbitration." Br. 20. And "if courts have the power (under Section 10(a)(4)) to vacate awards" on the "back end," respondent continues, "then surely courts have the power (under Section 4) to make the same determination" on the "front end." Br. 22.

That argument breaks down at each step. To begin with, when a party argues that an arbitrator "exceeded [his] powers" under an antecedent agreement to arbitrate arbitrability, the party is challenging the arbitrator's decision on the merits of the issue arbitrated under that agreement: namely, the issue of arbitrability. But Section 10(a)(4) does not permit a court to second-guess the merits of an arbitrator's interpretation of the arbitration agreement (or any other legal ruling); it is well established that "the interpretations of the law by the arbitrators * * * are not subject, in the federal courts, to judicial review for error in interpretation." *Wilko* v. *Swan*, 346 U.S. 427, 436-437 (1953), overruled on other grounds, *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

Indeed, it is hard to see how an arbitrator could "exceed[] [his] powers" under Section 10(a)(4) by deciding an issue that the parties expressly empowered him to decide. Section 10(a)(4) permits a court to overturn an arbitral award "[o]nly if the arbitrator acts outside the scope of his contractually delegated authority—issuing an award that simply reflects his own notions of economic justice rather than drawing its essence from the contract." *Oxford Health Plans LLC* v. *Sutter*, 569 U.S. 564, 569 (2013) (alterations, internal quotation marks, and citations omitted). But if the parties have in fact delegated the issue of arbitrability, the arbitrator will be acting within the scope of his authority however he decides that issue. For that reason, in the analogous context of proceedings to enforce arbitral awards under the New York Convention, courts have held that "[t]here [is] no need for [a court] to independently determine that [a dispute is arbitrable] once it ha[s] concluded that the parties had delegated this task to the arbitrator." *Chevron Corp.* v. *Republic of Ecuador*, 795 F.3d 200, 208 (D.C. Cir. 2015); see *Schneider* v. *Kingdom of Thailand*, 688 F.3d 68, 74 (2d Cir. 2012).

To be sure, there may be some post-award judicial review under Section 10 for errors of an egregious nature. While this Court has not squarely addressed the issue, some courts of appeals have held that Section 10 permits a court to deny enforcement of an arbitral award that is in "manifest disregard" of the law. *Stolt-Nielsen S.A.* v. *AnimalFeeds International Corp.*, 559 U.S. 662, 672 n.3 (2010); see *Hall Street Associates, L.L.C.* v. *Mattel, Inc.*, 552 U.S. 576, 584-585 (2008). It does not follow from any such limited "back end" review, however, that a court can simply short-circuit arbitral decisionmaking on the "front end." An arbitrator would surely act in "manifest disregard" of the law by ruling in favor of a party with a truly frivolous claim on the merits of an underlying dispute.

See, *e.g.*, *Collins* v. *D.R. Horton, Inc.*, 505 F.3d 874, 879 (9th Cir. 2007); *Dominion Video Satellite, Inc.* v. *Echostar Satellite L.L.C.*, 430 F.3d 1269, 1275 (10th Cir. 2005); *Marshall* v. *Green Giant Co.*, 942 F.2d 539, 550 (8th Cir. 1991). But this Court has made clear that, "even if it appears to the court to be frivolous," a court "ha[s] no business weighing the merits of [a] grievance" that the parties have agreed to arbitrate before sending the grievance to the arbitrator. *AT&T Technologies*, 475 U.S. at 649-650.

It makes perfect sense that the Arbitration Act would provide for greater judicial review on the "back end," after arbitral decisionmaking, than on the "front end." Congress enacted the Arbitration Act to "reverse the longstanding judicial hostility to arbitration agreements," *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991), under which courts would refuse to require parties to arbitrate issues they had agreed to arbitrate. See *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 510-511 & n.4 (1974). Congress thus sought to limit the discretion of courts to allow parties to bypass arbitration altogether. See H.R. Rep. No. 96, 68th Cong., 1st Sess. 1-2 (1924); Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 Va. L. Rev. 265, 269-270 (1926) (Cohen & Dayton). Accordingly, Congress established a regime under which courts had limited authority to refuse to enforce arbitration agreements, see 9 U.S.C. 2, and instead were required to compel arbitration whenever an arbitration agreement was valid and one party was refusing to comply, see 9 U.S.C. 4.

Congress could reasonably have been less concerned about judicial hostility to arbitration on the "back end": that is, after the parties had completed arbitration and obtained a decision. Indeed, Congress appears to have enacted the Arbitration Act's post-arbitration enforcement

mechanisms not to preempt judicial hostility to arbitration, but rather merely to "simplif[y]" the "procedure to enforce" the arbitrator's decision. Cohen & Dayton 270-272. An interpretation of the Arbitration Act that provides for a more limited judicial role on the "front end" than the "back end" thus aligns with Congress's objectives. Whatever the scope of judicial review of an arbitrator's decision on arbitrability under Section 10(a)(4), therefore, that provision offers no basis for a court preemptively to decide arbitrability for itself in the face of a valid delegation.

2. The 'Wholly Groundless' Exception Betrays The Federal Policy In Favor Of Arbitration And Disregards The Contracting Parties' Intent

Respondent argues that the "wholly groundless" exception is consistent with the pro-arbitration policy the Arbitration Act embodies. See Br. 23-32. Respondent's heavy reliance on policy considerations simply underscores the weakness of its textual arguments. Even taken on their own terms, however, respondent's policy arguments are unavailing.

a. Over and over again, respondent assures the Court that the "wholly groundless" exception does not apply to claims of arbitrability that are "genuine," "plausible," "legitimate," or "bona fide." Br. 12, 14, 16. But those assurances simply raise the question: who decides whether a claim is "genuine" or "legitimate"? This Court's precedents provide the answer: "the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter." *First Options*, 514 U.S. at 943. Where, as here, the parties include a delegation provision in their agreement, they vest the power to decide arbitrability in the arbitrator. It is the arbitrator then, who decides whether a claim of arbitrability is "genuine" or "legitimate." For a court to intercede and decide

that question for itself is to ignore the parties' contractual intent and the clear command of the Arbitration Act. See 9 U.S.C. 3-4.

Respondent contends that "the 'wholly groundless' test simply honors the parties' intent," because "[n]o contract grants a right to assert implausible claims." Br. 23. (internal quotation marks and citation omitted). "[T]here is no conceivable meeting of the minds," respondent continues, that would allow one party to make a claim of arbitrability the other party thinks is "groundless." Br. 24. Again, respondent misses the mark. The meeting of the minds here is simply the agreement as to who decides the claim of arbitrability. The parties' intent—manifested in the delegation provision—is to let an arbitrator decide whether a claim is subject to arbitration; there is no implied term carving out from the delegation provision cases in which one party thinks the claim of arbitrability is "wholly groundless."

When the parties have assigned the power to decide arbitrability to an arbitrator, a court must focus only on that antecedent agreement—and enforce it according to its terms. See *Rent-A-Center*, 561 U.S. at 70-72. The "wholly groundless" exception allows a court to claim that power for itself, contrary to the requirement that a court "give effect to the contractual rights and expectations of the parties." *Stolt-Nielsen*, 559 U.S. at 682 (internal quotation marks and citation omitted).

b. Respondent further contends that the "wholly groundless" exception protects against "bad-faith maneuvers designed solely to inject unnecessary expense and delay into a party's action." Br. 26. But the facts of this case belie the notion that the "wholly groundless" exception applies only to "baseless or illegitimate" claims of arbitrability. Br. 16.

At the very beginning of this case, the magistrate judge *granted* petitioners' motions to compel arbitration. See Pet. App. 39a-44a. Far from seeking arbitration in bad faith, petitioners relied on the widely accepted understanding that carve-outs for injunctive relief in arbitration provisions merely permit relief from a court either on a preliminary basis to preserve the status quo *before or during* arbitration of the underlying claims, or on a permanent basis *after* the plaintiff secures an arbitral award in its favor. See Pet. Br. 8-9 (citing cases). The magistrate judge agreed, but later courts deployed the "wholly groundless" exception to reverse his ruling.

This case illustrates, therefore, that the "wholly groundless" exception does not apply only in "the rarest of cases [in which] *any* legitimate argument defeats its application," as respondent contends. Br. 2. Instead, it provides license for courts to wield the age-old "judicial hostility to arbitration" even in the face of plausible (and in fact correct) arguments that the dispute does not belong in court. *Green Tree Financial Corp.-Alabama* v. *Randolph*, 531 U.S. 79, 89 (2000) (citation omitted).[2]

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[2] In theory if not in practice, parties could choose to craft an arbitration provision that divides responsibility for arbitrability between the arbitrator and the court (like respondent's hypothetical parties that agree to arbitrate arbitrability over widgets but not copyrights, see Br. 26). Relying on the carve-out for injunctive relief, respondent contends that the parties either divided responsibility for arbitrability or did not delegate responsibility to the arbitrator at all. See Br. 37-38. But that contention plainly lacks merit: the carve-out here was unambiguously a ***substantive*** carve-out (concerning the scope of *arbitration*), not a carve-out ***from the delegation*** (concerning the scope of ***arbitrability***). Put another way, the applicability of the carve-out is the very arbitrability question that, in petitioners' view, the arbitrator should have been permitted to decide: namely, "whether [the parties'] agreement cover[ed] [the] particular controversy" at issue.

More generally, where a party pursues a frivolous claim of arbitrability, the legal system already has safeguards to protect against such "bad-faith maneuvers." Respondent concedes both that arbitrators are empowered to decide arbitrability at the threshold—as they would presumably do if a claim of arbitrability were truly meritless—and that they can sanction bad-faith conduct with fee and cost shifting. See Br. 30-31.

What is more, that is far from the only remedy for frivolous or harassing claims. All lawyers have a professional obligation not to bring frivolous proceedings. See American Bar Association, Model Rules of Professional Conduct R. 3.1. And the federal civil rules require certification that any submission to a court "is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation." Fed. R. Civ. P. 11(b)(1). There is therefore no valid justification to fashion a substantive exception to the delegated authority of an arbitrator to decide gateway issues of arbitrability.

c. Respondent next attempts to justify the "wholly groundless" exception as consistent with the "strong federal policy in favor of quick and efficient dispute resolution." Br. 29. Again, the facts of this case undercut that argument.

It would be eminently reasonable for parties to believe that, regardless of the outcome, any disputes about arbi-

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Rent-A-Center, 561 U.S. at 69; see, *e.g.*, *Crawford Professional Drugs, Inc.* v. *CVS Caremark Corp.*, 748 F.3d 249, 262-263 (5th Cir. 2014); *Oracle America, Inc.* v. *Myriad Group A.G.*, 724 F.3d 1069, 1075-1076 (9th Cir. 2013). In light of the court of appeals' confusing discussion of this issue in its earlier opinion, see Pet. App. 6a-11a, the Court may wish to provide guidance on the issue for the court of appeals on remand.

trability could be resolved more efficiently by an arbitrator than by a court. The central benefits of arbitration, after all, are the "expeditious results" and the "reduc[ed] * * * cost" of dispute resolution. *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985); *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 345 (2011). Because of the "wholly groundless" exception, however, the parties in this case were forced to detour into federal court and engage in preliminary (and potentially non-dispositive) motions practice about arbitrability that has now dragged on for six years—longer, surely, than it would have taken to resolve the underlying claims in arbitration. See J.A. 23-48. And in the interim, petitioners have had to endure years of costly discovery, as well as other motions practice and attendant costs of litigation in federal court.

Respondent complains that the "extended delay was the result of a procedural snafu where the case was apparently lost in the district court's docket," and not the result of the "wholly groundless" exception. Br. 38. But that only proves petitioners' point: if the issue of arbitrability had been properly referred to the arbitrator in the first place, there would have been no such delay from multiple rounds of judicial review.

d. Respondent fails to grapple with the fact that all of its policy arguments apply with equal force to meritless *substantive* claims as they do to meritless claims of arbitrability. For example, when arbitrability is not in dispute and a party insists on arbitrating substantive claims that are surefire losers, it would certainly be more "efficient" to have a court say so at the outset. After all, frivolous claims subject the opposing party to wasteful expense and delay, and such a party presumably would not willingly agree to subject itself to abusive legal process. Yet this Court has squarely rejected such reasoning, holding that

a court "is not to rule on the potential merits of the underlying claims * * * even if [they] appear[] to the court to be frivolous." *AT&T Technologies*, 475 U.S. at 649-650. So too with a claim of arbitrability: there, too, a district court "ha[s] no business" looking at the merits of the claim. *Id.* at 650 (citation omitted).

e. Respondent further contends (Br. 29) that the "wholly groundless" exception is necessary to prevent parties from being compelled to arbitrate the merits of the underlying dispute if they did not agree to do so. But where the parties delegate authority to an arbitrator to decide whether the dispute is arbitrable, courts must presume that the arbitrator is "competent, conscientious, and impartial." *Mitsubishi Motors*, 473 U.S. at 634. The risk that a competent arbitrator will nevertheless arbitrate claims plainly outside the scope of the parties' agreement is exceedingly low.

The real risk if this Court were to endorse the "wholly groundless" exception is that every party seeking to avoid arbitration will take a shot in federal court first, hoping to capitalize on the longstanding "judicial hostility to arbitration." *Green Tree*, 531 U.S. at 89. Aside from "burdening courts and individuals alike with needless expense and delay," *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 398 (1990), such an approach is contrary to the clear command of the Arbitration Act. This Court should reject it.

3. The 'Wholly Groundless' Exception Has No Basis In The History Of The Arbitration Act

Unable to justify the "wholly groundless" exception based on text or policy, respondent resorts to a selective retelling of the Arbitration Act's history. Those arguments, too, are deeply flawed.

a. Respondent contends that the legislative history reflects Congress's intent for Sections 3 and 4 of the Arbitration Act to "play a protective role in ensuring that parties would not be forced to arbitrate unexpectedly." Br. 33. But respondent notably does not claim that the history evinces an affirmative decision by Congress to adopt the "wholly groundless" exception (or anything like it). Rather, respondent asserts only that the "wholly groundless" exception is "cut from th[e] same cloth" as Sections 3 and 4. *Ibid.*

Whatever that means, nothing in the text of those sections—or any other section of the Arbitration Act—supports the view that Congress intended to create an unstated exception to the requirement that parties are bound to the terms of their arbitration agreements. See pp. 5-11, *supra*. And there is no need to create a "wholly groundless" exception to address any congressional concern about parties being forced to arbitrate arbitrability disputes without their consent; that concern is already met by the requirement that parties clearly and unmistakably delegate questions of arbitrability to the arbitrator.

b. Respondent next invokes New York arbitration law, which it contends served as a model for the Arbitration Act. As with its arguments on the Arbitration Act, however, respondent fails to point to any provision of the New York arbitration law that could provide a plausible basis for the "wholly groundless" exception. Respondent instead relies on a single New York decision, *S.A. Wenger & Co.* v. *Propper Silk Hosiery Mills, Inc.*, 146 N.E. 203 (N.Y. 1924), which it argues shows that "Congress * * * enacted the [Arbitration Act] against the backdrop of rare situations where arbitration is properly refused because the demand was patently meritless." Br. 34.

The decision in *S.A. Wenger* provides no aid to respondent. To begin with, the statement respondent quotes is dictum; the court in fact ordered the parties to arbitrate. See 146 N.E. at 204. In any event, that statement has nothing to do with arbitrability; it merely refers to the possibility of refusing to commit a party's claim to arbitration because of the weakness of the claim *on the underlying merits*. See *id.* at 203. And there is no reason to think that Congress was aware of *S.A. Wenger*, much less that statement, when it adopted the Arbitration Act; the bill that became the Arbitration Act was originally drafted in August 1923 and was effectively finalized in May 1924, but the decision in *S.A. Wenger* did not issue until December 1924. See Ian R. Macneil, *American Arbitration Law: Reformation, Nationalization, Internationalization* 91, 100 (1992).

c. Finally, respondent attempts to bolster its case for the "wholly groundless" exception simply by citing decisions from lower courts that have adopted that exception (or a similar rule). See Br. 34-35. At least in the context of the Arbitration Act, however, the "wholly groundless" exception dates back only to a Federal Circuit decision from a little over a decade ago—and the courts of appeals to have adopted the exception have made little effort to ground it in the Arbitration Act's text. See *Qualcomm Inc.* v. *Nokia Corp.*, 466 F.3d 1366 (2006); Pet. Br. 23-26.

Perhaps for that reason, respondent mostly relies on decisions from the context of labor arbitration, which is governed not by the Arbitration Act but by federal common law. But those decisions, too, provide little affirmative support for respondent's position. For example, in *Electrical Workers* v. *General Electric Co.*, 233 F.2d 85 (1st Cir. 1956), aff'd on other grounds, 353 U.S. 547 (1957), the court of appeals did "not pass[] upon the question of * * * arbitrability," instead remanding for the district

court to do so "in the first instance." *Id.* at 101. To be sure, the court of appeals advised the district court to respect any delegation of arbitrability to an arbitrator as long as "the applicant's claim of arbitrability is not frivolous or patently baseless." *Ibid.* But the only support the court cited for that assertion were dicta from another of its own decisions issued the same day and a district-court decision stating in passing that a claim of arbitrability was *not* frivolous. See *ibid.*

Even in the context of labor arbitration, moreover, this Court has long held, consistent with the Arbitration Act, that when "parties have agreed to submit all questions of contract interpretation to the arbitrator," the court's role "is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract." *Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564, 567-568 (1960). Although *Steelworkers* did not involve a delegation provision, the Court's message has been clear: "[t]he courts * * * have no business weighing the merits of the grievance" when "[t]he agreement is to submit all grievances to arbitration." *Id.* at 568. So too here.

* * * * *

At its heart, this is not a complicated case. Respondent has no answer to the text of the Arbitration Act or to this Court's precedents construing it: there is no exception in the Arbitration Act permitting a court to refuse to enforce a provision delegating arbitrability to the arbitrator on the ground that it deems the claim of arbitrability to be "wholly groundless." This Court should accordingly reject the court of appeals' adoption of such an exception. The judgment of the court of appeals should be vacated, and the case remanded for further proceedings.

Respectfully submitted.

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